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No. 00-**00 . 946**

IN THE
Supreme Court of the United States

S.S., by and through Her Next Friend and Guardian *Ad Litem*, ELLEN D. JERVIS,

Petitioner,

v.

MICHELLE McMULLEN, SHERRY JACOBY, and KATHLEEN BARNETT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELLEN D. JERVIS
Counsel of Record
LISA A. WEIXELMAN
POLSINELLI SHALTON & WELTE, P.C.
Attorneys for Petitioner
700 W. 47th St., Suite 1000
Kansas City, MO 64112
(816) 753-1000

163594
Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the state's action in delivering a five-year-old child in its custody to a parent whom it knows to be dangerous constitutes an action that can give rise to § 1983 liability as held by two federal courts of appeals.

Whether the state's action in knowingly delivering a five-year-old child in its custody to a parent whom the state knew would allow a pedophile to sodomize her constitutes deliberate indifference and shocks the conscience.

PARTIES TO THE PROCEEDING

Petitioner

S.S. by and through Her Next Friend and Guardian Ad Litem, Ellen D. Jervis.

Respondents

Michelle McMullen, Sherry Jacoby, Kathleen Barnett, and Cynthia M. Montgomery, Ph.D. Respondent Montgomery is not a party to the appeal.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Eighth Circuit panel opinion (App. B) is reported at *S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066 (8th Cir. 1999). The Eighth Circuit en banc opinion (App. A) is reported at *S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960 (8th Cir. 2000) (en banc).

STATEMENT OF JURISDICTION

The judgment of the Eighth Circuit Court of Appeals en banc was entered on September 13, 2000 (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved provisions of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. Amend. XIV, § 1.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws . . .

STATEMENT OF THE CASE

The Division removed S.S. from her parents' legal and physical custody when she was three years old. The Division had substantiated several child abuse hotline calls and, on April 5, 1994, the Circuit Court of Cass County, Missouri placed S.S. in the Division's permanent custody for placement in foster care. The Division kept her in its custody for approximately two and one half years — until August 1996.

Respondents Michelle McMullen and Sherry Jacoby are social workers in the Missouri Division of Family Services. The Division assigned them to S.S.'s case in February and May of 1994, respectively. Respondent Kathleen Barnett supervised McMullen and Jacoby, receiving and approving all dictation, correspondence and written reports regarding S.S. at all times relevant to her complaint. The Division initially allowed S.S. supervised visits with her father under the supervision of McMullen while she was in state custody. A convicted child molester, Joel Griffis, attended three of these visits. Griffis later was present at unsupervised visits, which respondents also knew.

The respondents first learned that child molester Griffis presented a danger to S.S. when McMullen received an anonymous phone call on September 20, 1995, stating that, "a man named Joel who has been convicted of numerous sex charges has been around [S.S.] and her father." McMullen further learned that S.S.'s father had allowed contact between Griffis and S.S. on nine occasions between October 1995 and August 1996.

The Division had a psychological evaluation conducted on S.S.'s father by Dr. Gregory Sisk in May of 1996, and McMullen received a copy of that evaluation. Dr. Sisk expressed concern and cautioned the Division that returning S.S. to her father's custody might place her at risk. Dr. Sisk stated that, "[h]e seems dangerously sympathetic with a known child sexual offender, which would appear to be very risky behavior," and that, "children in his care could be at risk of abuse/neglect due to his beliefs about child rearing." Sisk further stated that "[p]lans towards reunification should proceed cautiously." In July 1996, McMullen also became aware of an anonymous child abuse hotline call to her office that stated, "S. had a rash 'down there' that there is a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." McMullen investigated the report by questioning S.S. at her day care and by visually examining her genital area but failed to contact law enforcement authorities or to have the child examined by medical professionals. The child molester himself contacted McMullen on August 13, 1996, stating that he felt it was unfair to limit his contact with S.S.

Jacoby, too, knew of S.S.'s peril. She documented her knowledge of the anonymous call to McMullen regarding Griffis' history as a child molester. She also knew of a

telephone call from S.S.'s foster mother to the Division on June 20, 1995 stating that, "S. told her over and over that she humps with her daddy." Jacoby also knew S.S. exhibited inappropriate sexual acting out behaviors on at least three occasions. Further, she documented her knowledge of Joel Griffis' presence at unsupervised visits between S.S. and her father and received a call from the foster parent in October 1995 stating that Griffis was with the father when he arrived to pick up the child for a visit. Jacoby also knew on December 19, 1995 that S.S. had a yeast infection and complained of "hurting in her vagina area."

Despite this knowledge, starting in March of 1996, McMullen, Jacoby and Barnett sent S.S. to live with her father on a full-time "extended visit." McMullen — eight days after Griffis' call complaining of limits on his contact with S.S. and three months after Dr. Sisk's report — requested that the Cass County Circuit Court release S.S. from the custody of the state and return her to the legal custody of the father. On August 22, 1996, the court granted McMullen's request, returned S.S. to the custody of her father and released the child from the court's jurisdiction. McMullen's dictation on that date recounts that she and her supervisor (Barnett) decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible."

In February 1997, a child abuse hotline alleged that Griffis had sexually molested S.S. on November 15, 1996 and January 15, 1997 (including periods of time when the father had allowed Griffis to live with him and S.S). Griffis was charged with two counts of first degree statutory sodomy in Jackson County and two counts of sodomy in Cass County. S.S.'s father was charged with felony child

endangerment in both Jackson and Cass Counties. As a result of the sexual abuse she suffered, S.S. was hospitalized for one week. She remained institutionalized at a psychiatric facility in Kansas City when her guardian ad litem filed the Complaint.

A. The United States District Court for the Western District of Missouri, Western Division

On the respondents' Motion to Dismiss and prior to any discovery, the United States District Court for the Western District of Missouri, Western Division, granted the motion and dismissed S.S.'s Complaint. App. C. The district court ruled that the petitioner's allegations do not give rise to a due process claim and that the respondents are protected from liability by absolute and qualified immunity. The court declined to discuss the immunity issues, relying on *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). The court held that the respondents had no substantive due process duty to protect the petitioner from harm by a private third-party individual. The court recognized that *DeShaney* imposes a duty on state actors to protect its citizens "in custodial and other settings in which the state has limited the individual's ability to care for themselves (custodial cases); and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced (state-created danger cases)." *Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289, 293 (8th Cir. 1993) (quoting *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 913 (1993)). The district court stated that the abuse occurred after she was returned to her father's custody and that there was no special or custodial relationship with the state. Further, although "an

argument can be made that the State's actions placed plaintiff in a greater position of danger or vulnerability because the state interfered with any potential rescue by private persons," the state did not place S.S. in a position of danger she would not otherwise have faced. App. C at 52a.

B. United States Court of Appeals for the Eighth Circuit

On the petitioner's appeal from the decision of the Western District of Missouri, the United States Court of Appeals for the Eighth Circuit reversed the judgment of the district court and remanded the case for further proceedings. *See S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066 (8th Cir. 1999). The panel ruled that the respondents did not merely fail to protect S.S. from the child molester, but that they affirmatively placed S.S. into Griffis' path. App. B at 38a. The court stated that *DeShaney* did not control the present case and recognized "a viable claim under the 'state-created danger' theory, which recognizes the obligation of state actors to subsequently ***protect*** an individual after they have created a danger to the individual's well-being." App. B at 32a (emphasis in original). The court found that "this case primarily concerns S.S.'s right not to be injured by the state — essentially a 'negative liberty' — a right which both predates *DeShaney* and is broader than S.S.'s right to be protected by the state, the 'positive' liberty that *DeShaney* limited." App. B at 34a-35a.[1]

1. This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from the custody of her parents;

(Cont'd)

The court also found that the respondents acted with the requisite degree of culpability, stating that the facts supported the notion that the respondents were deliberately indifferent to a known substantial risk of serious harm to the petitioner. App. B at pp. 39-40a. The court found that the respondents' deliberate indifference shocked the conscience under the "continuum of 'deliberately indifferent' conduct" set forth in *County of Sacramento v. Lewis*, 523 U.S. 833 (1988). App. B at 41a.

The court granted rehearing at respondents' request and vacated the panel opinion. The court *en banc* affirmed the order of the district court. *S.S. ex rel. Jervis v. McMullen*, 225 F.3d 960 (8th Cir. 2000) (en banc). In doing so, the court found that the state, by returning S.S. to her father, did not increase the danger of significant harm to S.S.; "it merely placed her back into the situation from which it originally retrieved her." The court stated that, "*DeShaney* speaks specifically to this kind of situation." App. A at 4a.

The court drew a distinction between exposing a child to a dangerous environment and returning her to an equally

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(Cont'd)

> having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights . . . under the cruel and unusual punishments clause . . . if he was a convicted prisoner, or the due process clause if he was awaiting trial.

K.H. ex rel. Murphy v. Morgan, 914 F.2d 846, 848-49 (7th Cir. 1990).

dangerous one. App. A at 5a.[2] The court found that the state "did do something" but that, in the "peculiar circumstances," that act was the equivalent of doing nothing. App. A at 6a.

The court further found that the state's action did not rise to the level of acts that shock the conscience.[3] In finding that S.S. alleged negligence only, the court cited the state's obligation to reunite children with their parents if possible.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF TWO FEDERAL COURTS OF APPEALS AND AGGRAVATES THE EXISTING SPLIT OF AUTHORITY IN THE DISTRICT COURTS

Since this Court decided *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), a dangerous uncertainty has existed in defining the circumstances that give rise to a constitutional duty by the state to provide protection to individuals from private acts of violence. *DeShaney* essentially held that state actors generally have no due process obligation to protect private parties from other private parties. The state's duty to protect its citizens from each other is limited. However, *DeShaney* did leave open the question of whether due process rights are violated when the state affirmatively places a child previously in state custody into circumstances that

2. *See K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-849 (7th Cir. 1990).

3. *See County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998).

render her more vulnerable and susceptible to danger. *See id.* at 201. Different circuits have answered this question differently. In several circuits, the state has been held liable when it places a child with a foster parent known or suspected of being a child abuser.[4] Other circuits, under the "state-created danger" theory, have also found liability when the state actors affirmatively placed a child with an abusive parent or relative.

Here, the Eighth Circuit held that such a placement with an abusive parent was not actionable even while recognizing that other courts have found liability. The decision itself admits that "a leading case involving similar circumstances in another circuit reached a contrary result." App. A at 5a. The court then attempts to distinguish its opinion from the Seventh Circuit's decision in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). Both cases involved social service workers placing a child in the custody of a person known to be a child abuser.[5] In the Seventh Circuit, the state's deliberate act in *K.H.* was actionable; in the Eighth Circuit, because S.S. was returned to her father's custody instead of placed with a foster parent, the court concluded that she was not exposed to a different danger from which she was removed. Even while admitting that the state "did do something here," the court held that "the state's act is the same as if it had done nothing" in the "peculiar circumstances" presented here. App. A at 6a.

4. *See Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289 (8th Cir. 1993); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Meador v. Cabinet For Human Resources*, 902 F.2d 474 (6th Cir. 1990), *cert denied*, 498 U.S. 867 (1990); *T.M. ex rel. R.T. v. Carson*, 93 F. Supp. 2d 1179 (D. Wyo. 2000).

5. In *K.H.*, the state delivered the child to an abusive foster home, not a natural parent.

Despite attempting to distinguish *K.H.*, the court did not recognize that the Seventh Circuit has extended liability beyond abusive foster care situations.[6] Chief Judge Posner stated in another case that, "if the defendants' employees knowingly placed [the child] in a position of danger [with her father] they would not be shielded from liability by the decision in *DeShaney*." *Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995). The Seventh Circuit also held "If the officers are complicit in the violence, they are liable." *Id.* Chief Judge Posner cites *K.H.*; *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert denied*, 508 U.S. 951 (1993); and *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990), all of which recognize the "state-created danger" theory. Under these cases, state actors must subsequently protect an individual after they have created a danger to that individual's well being.

Also in 1995, in *Camp v. Gregory*, 67 F.3d 1286, 1294 (7th Cir. 1995), *cert denied*, 517 U.S. 1244 (1996), the Seventh Circuit recognized the right of a child not to be placed with a caregiver that the state knows cannot provide adequate guidance and supervision. In *Camp*, the custodian was the child's aunt. Again, contrary to the Eighth Circuit's opinion here, the Seventh Circuit found that *DeShaney* did not categorically remove custody transfers from actionable due process claims.

Unlike the Eighth Circuit's characterization of custody transfers as "inaction," the Seventh Circuit has ruled that *DeShaney* would not shield the state from liability if

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6. *K.H.* goes on to say, "The only right in question in this case is the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, ***whom the state knows or suspects to be a child abuser.***" *Id.* at 852.

presented with the facts in the instant case. As Judge Gibson articulates in his dissent,

> These distinctions, between new dangers and old and between foster parents and natural parents, are arbitrary. I believe the proper distinction is whether the state actors have so intervened in the child's situation that they can be said to have rescued the child from danger.

App. A at 16a. This view is consistent with the decisions in the Seventh Circuit.[7]

The Third Circuit has also found that custody transfers are not absolutely shielded from liability under *DeShaney*. *See Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995), *aff'd without opinion*, 116 F.3d 367 (3d Cir. 1997). Like the Eighth Circuit, the Third Circuit has recognized the "state-created danger" theory in cases where state actors have increased the plaintiff's risk of harm.[8] Unlike the Eighth Circuit, the Third Circuit has specifically recognized that a custody transfer to a known abusive biological parent caregiver is not an "inaction" but is instead an affirmative act of endangerment.

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7. "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

8. *See Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996) (police officers increased the risk of harm to an intoxicated pedestrian); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) (police chief interfered with restraining order, creating the danger that resulted in victims' deaths).

> The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations. It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the Court after a CYS investigation and recommendation.

Id. at 233.

In another district court case from the Third Circuit, *Tazioly, et al. v. City of Philadelphia*, 1998 WL 633747, *5 (E.D. Pa.), the court held that the Department of Public Welfare could be held liable for returning a child to a parent whom they knew to be unfit and dangerous. The municipality, "by taking deliberate steps to terminate successful two-year foster care and entrust Michael to the custody of his biological mother was as much an active tortfeasor as if it had thrown him into a snake pit." *Tazioly* at 12, citing *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). The facts of *Tazioly* are strikingly similar to the facts here — return of a minor child, after a lengthy period of state custody, to a parent that the state knew presented a danger to the child.[9] *Ford* also presented a very similar fact pattern involving return of a child to a known abusive parent after a foster care placement. In both cases, this affirmative act by the state was sufficient to allow liability under the "state-created danger" theory.

In a district court case now pending before the Tenth Circuit Court of Appeals (argued September, 2000), the issue

9. *Tazioly* settled after the district court's decision.

of whether *DeShaney* bars liability when a child is placed with a natural parent whom the state knows to be dangerous was also addressed. Citing *Ford* and *Tazioly*, the district court found that, "If Plaintiffs can prove Defendants had sufficient information indicating Anthony's father was dangerous, before the state relinquished custody, Plaintiffs may be able to make out a claim for violation of Anthony's right to substantive due process." *Currier v. Doran*, 23 F. Supp. 2d 1277, 1281-82 (D. N.M. 1998).

All of these cases have found a custody transfer to a natural parent or relative as described in S.S.'s complaint to be an affirmative act that was held to be actionable. Only in the Eighth Circuit is there an additional prerequisite that the plaintiff must be exposed to a different danger than that from which she was removed or else "the state's act is the same as if it had done nothing." App. A at 6a. This distinction is inconsistent with other courts' interpretation of *DeShaney*.

II. THE DECISION OF THE COURT OF APPEALS MISAPPLIES THE STANDARD SET FORTH BY THIS COURT IN *LEWIS*.

The court below found that the facts in S.S.'s Complaint rise to the level of negligence only. This finding misapplies the standard of culpability set forth by this Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); and *Davis v. Monroe County Board of Education*, 526 U.S. 629, 648 (1999).

"Deliberate indifference," unlike negligence, is actionable under § 1983. In finding deliberate indifference, this Court, in *Farmer v. Brennan*, stated that, "it is enough that the official acted or failed to act despite his knowledge

of a substantial risk of harm." (*Farmer*, 511 U.S. at 842). In *Davis*, this Court found that school officials were "deliberately indifferent" when their response to sexual harassment was "clearly unreasonable in light of known circumstances." 526 U.S. at 648. S.S.'s complaint recounts in great detail the state's knowledge that returning her to a parent "dangerously sympathetic with a known sexual offender" and who allowed that pedophile to have contact with her constituted a substantial risk of harm. The facts include an anonymous telephone call to the respondents regarding Griffis' history as a sexual offender, a child abuse hotline call alleging sexual abuse by Griffis, knowledge of S.S.'s inappropriate sexual behaviors, the pedophile's complaint about limits on his contact with S.S., and the warnings contained in Dr. Gregory Sisk's psychological evaluation. McMullen's own words condemn her by showing both her knowledge of the danger and her determination to deliver S.S. into it: that "if something happens to S. because he [the father] knows that Joell [sic] has done in the past that he will be solely responsible." The respondents' deliberate indifference to a known danger is spelled out in this written statement.

Since *Lewis* and *Davis* were decided, one court has addressed this issue in a foster care/child protection context. *See Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000). There, the Third Circuit examined the "deliberate indifference" standard. Citing *Farmer*, the court recognized that courts of appeals have applied the "deliberate indifference" standard outside of the Eighth Amendment context and have found liability when "the official knows of and disregards an excessive risk . . ." and that the official must both "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must draw the

inference." *Nicini* at 811, citing *Farmer*, 511 U.S. at 837. McMullen's statement that the father will be "solely responsible" for harm to S.S. clearly shows that she not only was aware of the facts, but that she also drew the inference.

Despite this evidence, the court below instituted a balancing test that reduces this level of egregiousness to negligence. In doing so, the court looked outside the record. The court stated that "it was her father who was seeking custody of her." App. A at 6a. The Complaint makes no such allegation. In fact, if discovery had been allowed, the record would show the father's hesitance to acquire custody throughout the pendency of the state's jurisdiction over the child. The court further relies upon the "state's obligation to reunite children with their parents if possible" as a factor to negate the egregiousness of the respondents' conduct. While this obligation was paramount at one time, Missouri child welfare policy has changed. In 1995 the applicable statute already reflected this shift from reunification with parents to the best interests of the child. *See* Mo. Rev. Stat. § 211.011 (1995). "The child welfare policy of this state is what is in the best interests of the child." *Id.* The phrase "preferably in his own home" was specifically deleted from the end of the sentence, "each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control . . ." in 1995. H.B. Nos. 232 and 485, and S.B. No. 174. This policy change in Missouri is consistent with federal policy under the Adoption and Safe Families Act of 1997[10] that places the safety of children as the paramount concern in placement decisions. This shift in policy should be reflected in any balancing test, especially since reunification for its own sake is never a goal.

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10. 42 U.S.C. § 671.

The court below went on to say that while deliberate indifference, even if found, might "shock the conscience" in certain contexts, citing *Lewis* at 850, it found no similarities between this case and Supreme Court cases where a substantive due process claim was found. App. A at 7a. *Lewis* stated that "deliberate indifference that shocks in one environment may not be so patently egregious in another . . ." 523 U.S. at 850.

The facts in S.S. where a child is in state custody and then is placed in her father's custody are more comparable to the reasoned medical treatment of prisoners context than a high speed police chase and its incumbent split-second decisions. *See Nicini* at 810. The Complaint is replete with examples of the details and information available to the respondents over a two-and-a-half-year period before they decided to deliver S.S. to her father and a known pedophile. Their deliberation and unhurried judgment is set forth in the Complaint, including their knowledge that "something" would happen to S.S. and their desire that the father, rather than themselves, would be "solely responsible." They were not acting, as police officers during a chase, without the opportunity to deliberate over the results of their actions; even without the benefit of formal discovery, their own words show both their deliberation and their deliberate indifference.

The respondents' actions in this case rise to the level of "deliberate indifference" as defined by this Court and other federal courts of appeals[11] and their two-and-one-half-year period of deliberation regarding the evidence of risks to S.S. shocks the conscience.

11. There is no liability "unless the official knows of and disregards an excessive risk . . ." *See Farmer v. Brennan*, 511 U.S. 825, 837, 119 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); time "to make (Cont'd)

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

Approximately 560,000 children are currently in foster care in this country. The stated case goal in 42 percent of these cases is to reunify the child with a parent or principal caregiver. The average stay in foster care is two years.[12] The decision below makes it unclear what circumstances rise to the level of a constitutional duty by the state to provide protection to children from private acts of violence when custody is transferred to a parent. While the state's primary obligation at one time was to reunify a child with the parents, a shift away from this mandate has occurred in the last ten years. Numerous high-profile child deaths due to abuse by parents, plus an increase in the number of children in foster care, have led to concerns that the child welfare system needs to find a way to strike the right balance between safety and permanency. Recent changes in both federal and state policy reflect this concern; the Adoption and Safe Families Act of 1997 mandates that child safety is now the paramount concern in all child welfare decision-making and, as

(Cont'd)
unhurried judgments." *See Nicini v. Morra*, 212 F.3d 798, 811 (3d Cir. 2000); "Plainly placed on notice of damages and chose to ignore the danger." *See Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987), *cert denied*, 489 U.S. 1065 (1989); "Defendants may be held liable [for] . . . deliberate indifference to a known injury, a known risk or a specific duty." *See Doe v. New York City Dep't of Soc. Services*, 649 F.2d 134, 145 (2d Cir. 1981), *cert denied*, 464 U.S. 864 (1983).

12. U.S. Dept. of Health and Human Services, *Child Welfare Outcomes 1998: Annual Report*, <www.acf.dhhs.gov/programs/cb/outcomes/childwelfare/Sec1/sec1.html>.

discussed above, changes in the Missouri child welfare policy in 1995 also reflect this shift.[13]

Child welfare workers must decide whether to place a child back into the home after a period of time in foster care. When making such a decision, guidance is needed to clarify the parameters of a child's right to be safe from placement by the state with a parent workers know is abusive. Due to the vast number of children out of their parents' custody, and increasing pressure to find permanent placements, this issue is one that state welfare workers face on a regular basis. Uncertainty in the standard for violations of the substantive due process rights of the children they are entrusted to protect from harm presents an important issue that this Court must decide.

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13. U.S. Dept. of Health and Human Services, *Child Welfare Outcomes 1998: Annual Report*, <www.acf.dhhs.gov/programs/cb/outcomes/childwelfare/Sec4.html>.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLEN D. JERVIS
Counsel of Record
LISA A. WEIXELMAN
POLSINELLI SHALTON & WELTE, P.C.
Attorneys for Petitioner
700 W. 47th St., Suite 1000
Kansas City, MO 64112
(816) 753-1000

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED SEPTEMBER 13, 2000

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-1732

S.S., by and through Her Next Friend and Guardian *Ad Litem*, Ellen D. Jervis,

Appellant,

v.

Michelle McMullen, Sherry Jacoby, and Kathleen Barnett,

Appellees, and

Cynthia M. Montgomery, Ph.D.,

Defendant.

National Association of Counties, Association of Minnesota Counties, Minnesota County Attorneys Association, and County of Hennepin,

Amici Curiae.

Appeal from the United States District Court for the Western District of Missouri.

Appendix A

Submitted: January 14, 2000

Filed: September 13, 2000

Before WOLLMAN, Chief Judge, and McMILLIAN, RICHARD S. ARNOLD, JOHN R. GIBSON, BOWMAN, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges.[1]

MORRIS SHEPPARD ARNOLD, Circuit Judge.

This is an action to recover damages under 42 U.S.C. § 1983 for the violation of substantive due process rights. When S.S. appealed from the district court's dismissal of her complaint for failure to state a claim, a panel of our court reversed. *See S.S. ex rel. Jervis v. McMullen*, 186 F.3d 1066 (8th Cir. 1999), *vacated* (8th Cir. Sept. 30, 1999). We granted rehearing and vacated the panel opinion. We now affirm the order of the district court.[2]

I.

S.S. alleged in her complaint that three employees of the Missouri Division of Family Services acted unconstitutionally when they released her from state custody and returned her to her father, although they had notice that her father was allowing her to have contact with the known

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1. The Honorable Kermit E. Bye, United States Circuit Judge, did not participate in the consideration of this case.

2. The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

pedophile who subsequently sodomized her on at least two occasions. S.S. also alleged that, before her return to her father, the known pedophile himself called one of the defendants to complain that it was unfair to try to limit his contact with S.S.

The *locus classicus* for determining whether these facts, if proved, would give rise to liability for a constitutional tort is *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In that case, the Court approved summary judgment against Joshua DeShaney, who claimed that although the state removed him temporarily from the custody of his abusive father, it did not do so permanently, and that his father finally beat him so severely that he suffered permanent brain damage. *Id.* at 193. The Court emphasized that the constitutional right to be free from bodily harm is a right secured only against state actors, not against private ones: The purpose of the fourteenth amendment "was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196. In denying Joshua a recovery, the Court remarked that while the state may have been aware of the dangers that Joshua faced, "it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

It is perhaps this last asseveration in *DeShaney*, namely, that the state did nothing to render the plaintiff more vulnerable to risks created by others, that has led some courts, including ours, to conclude that if the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his

or her state of mind, may have committed a constitutional tort. *See, e.g., Gregory v. City of Rogers, Arkansas*, 974 F.2d 1006, 1010 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993). While the correctness of that principle as a general matter is indisputable, we hold that it cannot give rise to liability in the present case for the simple reason that in returning S.S. to her father, the state did not increase the danger of significant harm to S.S.: It merely placed her back into the situation from which it had originally retrieved her.

We think that *DeShaney* in fact speaks specifically to this kind of situation. The Court held there that the state was not liable to Joshua, because "when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by once having offered him shelter." 489 U.S. at 201. Our previous cases have emphasized this aspect of *DeShaney*. For instance, in *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), we adverted to the proposition that a plaintiff in an action like the present one had to establish that "the state affirmatively place[d]" the plaintiff "in a position of danger [that he or she] would not otherwise have been in." It is true that two and a half years elapsed between the time that S.S. was taken from her father's custody and the time when she was returned to it, but we discern nothing in that interval that created a greater risk of abuse than the one that she would have faced had she never been taken from her father in the first place. In other words, the complaint contains no allegations that would justify a conclusion that by returning S.S. to her father the

state created greater risks to her than the ones to which she was originally exposed.

We are aware that a leading case involving arguably similar circumstances in another circuit reached a contrary result, *see K.H. through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990), but we think that its facts serve to distinguish it from our case. In *K.H.*, 914 F.2d at 849, the plaintiff sought compensation for injuries received when she was removed from her parents and placed in the custody of a foster parent who was known to be a child abuser. The court, relying on *DeShaney*, concluded that K.H.'s complaint stated a claim because the state had, if K.H. proved her case, placed her in a situation of danger. *Id.* The court did not advert to the statement in *DeShaney* that liability cannot be predicated on the state's deliberate act that returns a child to a risk that he or she was previously subject to, but we think that that is because that part of the holding in *DeShaney* was inapposite. In *K.H.*, 914 F.2d at 848-49, the state affirmatively exposed the plaintiff to a different danger from the one from which she was removed, that is, the state placed her in a foster home, and it was that act that was held to be actionable.

We are mindful that drawing a distinction between exposing a child to a dangerous environment and returning her to an equally dangerous one may seem to some to be gratuitous. The line between action and inaction has been important in the law for centuries, but it has proven to be an elusive and thin one; so it is perhaps not surprising that cases on either side of that line will be so close factually that drawing a legal distinction between them will often seem hard to justify. But we see the distinction nevertheless. While

the state did do something here, or at least in the present procedural posture we assume that it did, in the peculiar circumstances of this case the state's act is the same as if it had done nothing. The distinction is one, moreover, that we think *DeShaney* requires us to draw. The district court was therefore correct in dismissing S.S.'s complaint.

II.

We see another insuperable difficulty lying in S.S.'s way to a recovery. Even if the state in this case had acted affirmatively to create a danger to S.S., we think that the district court would nevertheless have been obliged to dismiss her complaint because the state's action did not rise to the level of egregiousness that is required to support an action for a substantive due process violation.

Assuming, as we must for present purposes, that the allegations in S.S.'s complaint are true, we think that they make out a case for negligence only. We come to this view not only because of the level of risk that a reasonable person would have assumed S.S. might be exposed to, but also because it was her father who was seeking custody of her. This last fact is one that must rest heavy in the balance in deciding the egregiousness of the defendants' conduct, because of the state's obligation to reunite children with their parents if possible; and we think that it serves to distinguish the case sharply from one in which the state delivered a child to, say, as in *K.H.*, a foster home that presented the same level of risk that S.S. alleges here.

In order to succeed, a complaint for a violation of substantive due process rights must allege acts that shock

the conscience, and merely negligent acts cannot, as a constitutional matter, do that: To hold otherwise "would trivialize the centuries-old principle of due process of law." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Even if the state's activities could be said to have been grossly negligent or even reckless in the circumstances present here, we believe that S.S.'s constitutional claim must fail. We have held more than once that gross negligence "is not actionable . . . under § 1983." *See Sellers by and through Sellers v. Baer*, 28 F.3d 895, 902-03 (8th Cir. 1994), *cert. denied*, 513 U.S. 1084 (1995). While deliberate indifference, depending on the circumstances and the kind of deliberation and indifference involved, might well shock the conscience, *see County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998), we see no similarity between our case and the Supreme Court cases in which a complaint was held to state a claim for the deprivation of substantive due process rights.

The Supreme Court's most recent pronouncement on relevant matters emphasizes that actionable cases must demonstrate a "level of . . . abuse of power," *id.* at 846, or activity that was "so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency," *id.* at 847, quoting *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957), itself quoting *Rochin v. California*, 342 U.S. 165, 174 (1952). Viewing the plaintiff's allegations in a light most favorable to her recovery, we cannot say that they describe the kind of conduct that violates substantive due process rights. We are mindful that the acts that S.S. claims were perpetrated against her once she was returned to her father were utterly indecent and egregious; and we do not doubt that those acts themselves would shock the conscience. They

certainly shock ours. But we focus here, not on those acts, but on the state's acts that S.S. says led to her injuries. We do not see how we could well hold those acts actionable without violating the Supreme Court's caveat against making "of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis*, 424 U.S. 693, 701 (1976).

III.

For the reasons indicated, we affirm the judgment of the district court.

JOHN R. GIBSON, Circuit Judge, with whom WOLLMAN, Chief Judge, and McMILLIAN, Circuit Judge, join, dissenting.

The court today holds that *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), determines the outcome of this case. *DeShaney*'s central holding is that state actors generally have no due process obligation to protect private parties from other private parties. 489 U.S. at 195-97. However, S.S. claims that she was harmed because of the reckless conduct of state actors who affirmatively endangered her. Because I believe her case differs crucially from the facts of *DeShaney* and its rationale, I would reverse the district court's dismissal of her complaint.

I.

According to her complaint, in January 1994 when S.S. was not quite three years old, she was taken into protective

custody by the Missouri Division of Family Services. S.S.'s father had allegedly smeared human feces onto her face, S.S. had been locked in her bedroom for periods of time by her parents, and she had been sexually abused by an unknown person. The authorities had also substantiated several child abuse hotline calls regarding the parents' neglect of S.S. On April 5, 1994, the Circuit Court of Cass County, Missouri, placed S.S. in the Division's permanent custody for placement in foster care.

Defendants Michelle McMullen and Sherry Jacoby are social workers in the Division and were assigned to S.S.'s case in February and May of 1994, respectively. Defendant Kathleen Barnett supervised both McMullen and Jacoby at all times relevant to her complaint; she received and approved all dictation, correspondence, and written reports regarding S.S. While S.S. was in the Division's custody, McMullen permitted S.S.'s father to visit S.S. under McMullen's supervision. A convicted child molester, Joel Griffis, was present during three of these visits in the summer of 1995.

The defendants later learned that Griffis was a child molester and that he presented a danger to S.S. First, McMullen received an anonymous phone call on September 20, 1995, stating that a man named "Joel" had been convicted of numerous sex offenses and had "been around" S.S. and her father. Second, McMullen learned from numerous sources that S.S.'s father had allowed contact between Griffis and S.S. on nine occasions between October 1995 and August 1996. Third, in May 1996, McMullen received a copy of a psychological evaluation of S.S.'s father. In it, Dr. Gregory Sisk expressed concern that returning S.S. to her father's

custody might endanger her welfare. Specifically, Dr. Sisk stated that a child in the care of S.S.'s father "could be at risk of abuse/neglect due to his beliefs about child rearing"; that the father "seems dangerously sympathetic with a known child sexual offender, which would appear to be a very risky behavior"; and that "plans toward reunification should proceed cautiously." Fourth, in July 1996, McMullen became aware of an anonymous child abuse hotline call stating that S.S. "had a rash 'down there' [and] that there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." Although McMullen investigated this allegation by questioning S.S. at day care and visually examining her genital area, she neither contacted law enforcement authorities nor arranged to have S.S. examined by a medical professional. Fifth, McMullen received a telephone call from Griffis on August 13, 1996. During the call, Griffis stated that it was unfair for the Division to limit his contact with S.S.

Jacoby was similarly aware of S.S.'s peril. She documented her awareness of the anonymous call to McMullen that warned the Division about Griffis's presence. Further, she was aware of a telephone call from S.S's foster mother to the Division on June 20, 1995. The foster mother stated that "S. told her over and over that she humps with her daddy, Jon." Jacoby also knew that S.S. had exhibited inappropriate sexual behaviors on at least three occasions. Other telephone calls informed Jacoby that S.S.'s father permitted Griffis to be in S.S.'s presence. Finally, Jacoby knew on December 19, 1995 that S.S. had a yeast infection and complained of "hurting in her vagina area."

Appendix A

Already having permitted S.S.'s father to have unsupervised visits with his daughter, McMullen, Jacoby, and Barnett permitted S.S. to live with her father on a full-time, "extended visit" basis starting March 8, 1996. S.S. remained on this basis until McMullen — just eight days after Griffis's phone call and three months after Dr. Sisk's report — requested the Cass County Circuit Court to release S.S. from State custody and to return legal custody to the child's father. On August 22, 1996, the court granted McMullen's request, returned S.S. to her father, and released the child from the court's jurisdiction. McMullen's dictation of that day's events recounts that she and her supervisor (Barnett) decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible."

In February 1997, a caller to a Jackson County child abuse hotline alleged that Griffis had sexually molested S.S. on November 15, 1996 and January 15, 1997. Both incidents occurred during times that Griffis was living with S.S. and her father. Griffis was charged with two counts of first-degree statutory sodomy in Jackson County and two counts in Cass County. S.S.'s father was charged with four counts of felony child endangerment in Jackson County. As a result of the abuse that she suffered, S.S. was hospitalized for one week. She remained institutionalized at a Kansas City psychiatric facility when her guardian ad litem filed the instant complaint.

II.

DeShaney involved the substantive due process claim of the boy Joshua, who had been beaten repeatedly by his

father. *See* 489 U.S. at 192-93. When Joshua was treated at a hospital for bruises and abrasions, the Department of Social Services recommended that the boy be placed in the hospital's temporary custody. *See id.* at 192. Three days later, a "Child Protection Team" (consisting of Department caseworkers among others) determined that there was insufficient evidence of child abuse and that Joshua should be returned to his father's custody. *See id.* Later, caseworkers from the Department continued to monitor the DeShaney home, observed numerous suspicious injuries, and were twice informed of such injuries by emergency room personnel. However, caseworkers took no action to protect Joshua from his father. *See id.* at 192-93. Eventually, Joshua was beaten so severely that he suffered severe brain damage and was rendered profoundly retarded. *See id.* at 193. Joshua and his mother sued the Department and several of its employees for failing to protect Joshua from his father, but the Court held that the defendants had no duty under the Due Process Clause to protect the child. *See id.* at 195-97, 202.

In contrast to *DeShaney*, this case primarily concerns S.S.'s right not to be injured by the state — essentially a "negative liberty" — a right that both pre-dates *DeShaney* and is conceptually distinct from the right to be protected by the state, the "positive" liberty that *DeShaney* limited.[3] Judge

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3. This court and others have recognized two exceptions to *DeShaney*'s rule that state actors have no constitutional duty to protect people from each other: the "special relationship" exception and the "state-created danger" exception. *See Norfleet ex rel. Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir.

(Cont'd)

Appendix A

Posner (now Chief Judge) explained the distinction in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990):

> This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights . . . under the cruel and unusual punishments clause . . . if he was a convicted prisoner, or the due process clause if he was awaiting trial.

(Cont'd)

1992) (en banc). These "exceptions" to *DeShaney* are sometimes cited in situations that should not fall under the *DeShaney* rule in the first place; in their pure form, the exceptions concern liability for failures to protect the victim, whereas I believe this case involves an affirmative act of harm. Therefore, I do not consider the exceptions applicable to this case.

(citations omitted). *Accord Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("There is a constitutional right not to be murdered by a state officer, . . . [b]ut there is no constitutional right to be protected by the state against being murdered by criminals or madmen.").

The court today recognizes that we must distinguish between failure to protect the victim and affirmative acts of endangerment. *Supra* at 4. Where I differ with the court is deciding where to draw the line between action and inaction. Unlike the court, I do not believe *DeShaney* puts custody transfers on the inaction side of that line.

The *DeShaney* plaintiffs did not attack the state's decision to transfer custody back to Joshua's father after the child's temporary emergency custody in the hospital. *DeShaney* offers no suggestion that the transfer itself was unwise, much less unconstitutional, given the defendants' knowledge at the time of the transfer. The *DeShaney* plaintiffs conceded that the state played no part in creating the danger that Joshua faced. *See id.* at 197; *see also DeShaney ex rel. First v. Winnebago County Dept. of Social Servs.*, 812 F.2d 298, 303 (7th Cir. 1987) ("[T]here is no evidence that the Department was reckless in returning Joshua to the custody of his father back in January 1983."). Rather, the plaintiffs based their constitutional claim upon the state's conduct after the state had relinquished custody of the child. *DeShaney* rejected their claim, for

> [w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do

> anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all.

489 U.S. at 201. This language must be taken in the context of a case in which the alleged due process violation happened *after* the state agency transferred custody. In contrast, S.S. claims that in the circumstances of her case, the transfer of custody was itself the due process violation.

Although "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter," *DeShaney*, 489 U.S. at 201, state actors who rescue children and then injure them may not defend on the ground that they had no duty to rescue the children in the first place.

> There is no duty to rescue a bystander in distress, but having rescued him from certain death you are not privileged to kill him. This is not to say that you assume responsibility for his future welfare. You do not. Our point is only that the absence of a duty to rescue does not entitle a rescuer to harm the person whom he has rescued.

K.H., 914 F.2d at 849. *See also Wood v. Ostrander*, 879 F.2d 583, 591-95 (9th Cir. 1989) (denying qualified immunity defense to substantive due process claim where woman was raped after officer impounded her car and left her alone in known high-crime area).

Therefore, even though children have no substantive due process right to be protected from abusive parents, the state may not itself subject children to abuse by knowingly delivering them into the hands of abusive care givers. *See, e.g., K.H.*, 914 F.2d at 852 (recognizing right of child in state custody not to be handed over to foster parent or other custodian whom state knows or suspects to be child abuser); *Nicini v. Morra*, 212 F.3d 798, 808-15 (3d Cir. 2000) (equivalent of foster care creates special relationship, but facts of particular case did not shock the conscience or show deliberate indifference).

Our court today considers pivotal the distinction between exposing the child to new dangers and returning her to old ones. *Supra* at 4. Similarly, in *K.H.* Judge Posner recognized a right of children in state custody not to be handed over to abusive care givers, but distinguished cases where children are delivered back to their own parents. *See K.H.*, 914 F.2d at 852-53. These distinctions, between new dangers and old and between foster parents and natural parents, are arbitrary. I believe the proper distinction is whether the state actors have so intervened in the child's situation that they can be said to have rescued the child from danger. At that point, the child's fate is in the state's hands, whether it decides to entrust him to stranger or kin, to new dangers or old. "Once the state acts to disturb the current custodial situation and assumes control over a child's life, the state may not create a dangerous condition for the child by knowingly or recklessly turning control of the child over to an abusive person, *even if that person is a parent or other family member*." *Currier v. Doran*, 23 F. Supp.2d 1277, 1281 (D.N.M. 1998) (emphasis added). *Accord Ford v. Johnson*,

899 F. Supp. 227, 233 (W.D. Pa. 1995) ("The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations. It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the court after a CYS investigation and recommendation."), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997). Chief Judge Posner himself reasoned, in a case alleging child abuse by a father, that if the state officers "knowingly placed [the child] in a position of danger, they would not be shielded from liability by the decision in *DeShaney*." *Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995). This does not mean that the rescuer becomes responsible for later acts of others (that is a separate question), but for his own bad acts — in this case, knowingly exposing a small girl to a convicted child molester.

The defendants in this case did not merely *fail to protect* S.S. from Griffis. Instead, they affirmatively placed S.S. into Griffis's path. The complaint alleges that McMullen, Jacoby, and Barnett were fully aware of the risks to which they were subjecting S.S., but decided that those risks were the "sole responsibility" of S.S.'s father. I believe they were wrong in their legal assessment, as well as their moral one.

III.

The court today further holds that S.S. failed to allege acts sufficiently culpable to establish a violation of her substantive due process rights. The court concedes that

"deliberate indifference, depending on the circumstances and the kind of deliberation and indifference involved, might well shock the conscience." *Supra* at 6 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998)). The court concludes, however, that S.S. has not pleaded facts amounting to anything more than negligence.

Unlike negligence, "deliberate indifference" requires the actor's knowledge that a substantial risk of serious harm accompanies his course of action. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (to meet "deliberate indifference" standard, prison official must know of and disregard excessive risk to inmate's health or safety); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999) (school officials are "deliberately indifferent" to sexual harassment of one student by another only when their response to it "is clearly unreasonable in light of the *known* circumstances") (emphasis added).

S.S's complaint alleges that the defendants' actions evince a "deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm." The alleged facts show the defendants knew many facts indicating that S.S. was at risk. McMullen knew that S.S.'s father had exposed his daughter to a known sex offender (evidenced by the anonymous telephone call she received, Dr. Sisk's psychiatric evaluation, the anonymous child abuse hotline call of July 1996, and Griffis's own complaints that his access to S.S. had been unfairly limited), while Jacoby documented her awareness of S.S.'s inappropriate sexual behaviors, S.S.'s complaints of pain in her genital area, various telephone calls

to the Division that warned of Griffis's presence, and sexual abuse by S.S.'s father. More significantly, the allegations in the complaint imply that McMullen consciously appreciated the risk and chose to put S.S. in harm's way. McMullen herself wrote that she and her supervisor decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible." In his dissent in *Kitzman-Kelley v. Warner*, 203 F.3d 454, 461 (7th Cir. 2000), Chief Judge Posner hypothesized just this situation as a clear case of liability, in contrast to the mere negligence shown in the case before him: "It is not as if [the defendants] had entrusted [the child] to someone whom they knew to have a record as a child molester; that would be an example of conscious indifference to an obvious danger . . . ."

Whether the defendants' deliberate indifference shocks the conscience presents a separate but related question. *Lewis* explored the continuum of "deliberately indifferent" conduct and held that "[d]eliberate indifference that shocks [the conscience] in one environment may not be so patently egregious in another." 523 U.S. at 850. Substantive due process therefore demands "an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Id. Lewis* placed particular importance upon the state defendant's ability to actually deliberate upon his conduct before undertaking it. *Id.* at 851. Therefore, the reckless police pursuit of a fleeing motorist in *Lewis* did not "shock the conscience" when injuries were caused thereby, *id.* at 854, nor does a jailer's deliberately indifferent response to a prison riot establish an Eighth Amendment claim. *Id.* Prison officials' "deliberate indifference" toward a pretrial

detainee's medical needs, on the other hand, can indeed implicate substantive due process. *Id.* at 851-52. Such liability "rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id.* at 853.

I believe that the defendants' conduct in this case resembles the actionable deliberate indifference of prison officials more closely than the non-actionable recklessness of police officers who pursue fleeing suspects at high speeds through crowded cities. Unlike the police officers in *Lewis*, the defendants faced no split-second decision in determining S.S.'s custody. To the contrary, S.S.'s complaint recounts the defendants' reflections upon the risk to which they willfully subjected S.S. The court's conscience should most certainly be shocked by the complaint before us. I therefore would reverse the dismissal of S.S.'s complaint.

Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED JULY 21, 1999

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 98-1732

S.S., by and through her Next Friend and guardian ad litem, Ellen D. Jervis,

Plaintiff – Appellant,

v.

Michelle McMullen; Sherry Jacoby; Kathleen Barnett;

Defendants – Appellees,

Cynthia M. Montgomery, Ph.D.,

Defendant.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 24, 1998
Decided: July 21, 1999

Before WOLLMAN, JOHN R. GIBSON, and MORRIS S. ARNOLD, Circuit Judges.

Appendix B

JOHN R. GIBSON, Circuit Judge.

In this 42 U.S.C. § 1983 action, S.S., now an eight-year-old girl, appeals the district court's dismissal of her claims against the defendants. S.S. alleged that three employees of the Missouri Division of Family Services violated her substantive due process right to bodily integrity, or, as she terms it, "to be reasonably safe from harm." Her complaint charged that the defendants placed S.S. in her father's custody while knowing that her father associated with a convicted pedophile — Joel Griffis — to whom S.S. might be exposed. Some three months after the defendants recommended that custody of S.S. be transferred to her father, S.S. was sodomized by Griffis. Five months later, S.S. filed this lawsuit through her next friend and guardian ad litem, Ellen D. Jervis. Relying upon *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the district court dismissed S.S.'s suit. We reverse and remand for further proceedings.

Because we are considering a motion to dismiss, we must accept as true the facts alleged in S.S's complaint. *Haberthur v. City of Raymore*, 119 F.3d 720, 723 (8th Cir. 1997). While not quite three years old, S.S. was taken into the Division's protective custody in January 1994. Several occurrences led to the transfer of S.S. to the Division's custody. For instance, S.S.'s father[1] had allegedly smeared human feces onto her face. Further, S.S. had been locked in her bedroom for periods of time by her parents and was sexually abused by an unknown person. The authorities had also substantiated

1. In order to shield S.S.'s identity, we have avoided referring to her father by name.

several child abuse hotline calls regarding the parents' neglect of S.S. On April 5, 1994, the Circuit Court of Cass County, Missouri, placed S.S. in the Division's permanent custody for placement in foster care.

Defendants Michelle McMullen and Sherry Jacoby are social workers in the Division and were assigned to S.S.'s case in February and May of 1994, respectively. Defendant Kathleen Barnett supervised both McMullen and Jacoby at all times relevant to this lawsuit; she received and approved all dictation, correspondence, and written reports regarding S.S. While S.S. was in the Division's custody, McMullen permitted S.S.'s father to visit S.S. under McMullen's supervision. Griffis was present during three of these visits: July 18, 1995, August 18, 1995, and August 25, 1995.

The defendants later learned that Griffis was a child molester and that he presented a danger to S.S. First, McMullen received an anonymous phone call on September 20, 1995, stating that a man named "Joel" had been convicted of numerous sex offenses and had "been around" S.S. and her father. Second, McMullen learned from numerous sources that S.S.'s father had allowed contact between Griffis and S.S. on nine occasions between October 1995 and August 1996. Third, in May 1996, McMullen received a copy of a psychological evaluation of S.S.'s father. In it, Dr. Gregory Sisk expressed concern that returning S.S. to her father's custody might endanger her welfare. Specifically, Dr. Sisk stated that a child in S.S.'s father's care "could be at risk of abuse/neglect due to his beliefs about child rearing"; that the father "seems dangerously sympathetic with a known child sexual offender, which would appear to be a very risky behavior"; and that "plans toward reunification should

proceed cautiously." Fourth, in July 1996, McMullen became aware of an anonymous child abuse hotline call stating that S.S. "had a rash 'down there' [and] that there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." Although McMullen investigated this allegation by questioning S.S. at day care and visually examining her genital area, she neither contacted law enforcement authorities nor arranged to have S.S. examined by a medical professional. Fifth, McMullen received a telephone call from Griffis on August 13, 1996. During the call, Griffis stated that it was unfair for the Division to limit his contact with S.S.

Jacoby was similarly aware of S.S.'s peril. She documented her awareness of the anonymous call to McMullen that warned the Division about Griffis's presence. Further, she was aware of a telephone call from S.S's foster mother to the Division on June 20, 1995. The foster mother stated that, ". . . S. told her over and over that she humps with her daddy, Jon." Jacoby also knew that S.S. had exhibited inappropriate sexual behaviors on at least three occasions. Other telephone calls informed Jacoby that S.S.'s father permitted Griffis to be in S.S.'s presence. Finally, Jacoby knew on December 19, 1995, that S.S. had a yeast infection and complained of "hurting in her vagina area."

Already having permitted S.S.'s father to have unsupervised visits with his daughter, McMullen, Jacoby, and Barnett permitted S.S. to live with her father on a full-time "extended visit" basis starting March 8, 1996. S.S. remained on this basis until McMullen — just eight days after Griffis's phone call and three months after Dr. Sisk's report — requested the Cass County Circuit Court to release

S.S. from State custody and to return legal custody to the child's father. On August 22, 1996, the court granted McMullen's request, returned S.S. to her father, and released the child from the court's jurisdiction. McMullen's dictation of that day's events states that she and her supervisor (Barnett) decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible."

The next February, a call to a Jackson County child abuse hotline alleged that Griffis had sexually molested S.S. on November 15, 1996, and January 15, 1997. Both incidents occurred during times that S.S.'s father had allowed Griffis to live with him and S.S. Griffis was charged with two counts of first-degree statutory sodomy in Jackson County and two counts in Cass County. S.S.'s father was charged with four counts of felony child endangerment in Jackson County. As a result of the abuse that she suffered, S.S. was hospitalized for one week. She remained institutionalized at a Kansas City psychiatric facility when her guardian ad litem filed the instant complaint.

Relying upon *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the district court granted defendants' motion to dismiss the complaint. The court held that S.S. lacked a substantive due process right to be protected from Griffis by the defendants, who are state employees.[2] This appeal followed. Because

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2. The district court also dismissed S.S.'s procedural due process claim against the defendants. S.S. contended that Missouri statutory law sets out mandatory procedures that social workers and the Division must follow, giving rise to a liberty interest in personal safety. S.S. does not appeal this aspect of the district court's ruling.

the defendants in this case did not merely "fail to protect" S.S. from Griffis, we reverse the judgment of the district court.

I.

A complaint should be dismissed under Fed.R.Civ.P. 12(b)(6) only if, taking the allegations as true, "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). We review *de novo* the question of whether S.S.'s complaint states a viable claim. *See Haberthur v. City of Raymore*, 119 F.3d 720, 723 (8th Cir. 1997). We hold that it does.

A.

Both plaintiff and defendants rely primarily upon *DeShaney* and its progeny in this and other circuits. This reliance is misplaced because it obscures the affirmative nature of the defendants' misconduct. Nevertheless, our inquiry must commence with *DeShaney*.

DeShaney's central holding is that state actors generally have no due process obligation to protect private parties from other private parties. 489 U.S. at 195-97. *DeShaney* involved the substantive due process claim of a boy (Joshua) who had been subjected to repeated beatings by his father. *Id.* at 192-93. When Joshua was treated at a hospital for bruises and abrasions, the Department of Social Services recommended that the boy be placed in the hospital's temporary custody. *Id.* at 192. Three days later, a "Child

Protection Team" (consisting of Department caseworkers among others) determined that there was insufficient evidence of child abuse and that Joshua should be returned to his father's custody. *Id.* The *DeShaney* plaintiffs did not challenge or otherwise attack this determination. Later, caseworkers from the Department continued to monitor the DeShaney home, observed numerous suspicious injuries, and were twice informed of such injuries by emergency room personnel, but took no action to protect Joshua from his father. *Id.* at 192-93. Eventually, Joshua was beaten so severely that he suffered severe brain damage and was rendered profoundly retarded. *Id.* at 193. Joshua and his mother sued the defendants for failing to protect Joshua from his father, but the Court held that the defendants had no duty to protect the child under the Due Process Clause. *Id.* at 195-97, 202.

Two related considerations distinguish the present case from *DeShaney*. First, the *DeShaney* plaintiffs did not attack the state's decision to transfer custody back to Joshua's father after the child's temporary emergency custody in the hospital. *DeShaney* offers no suggestion that the transfer itself was unwise, much less unconstitutional, given the defendants' knowledge at the time of the transfer.[3] Rather, the plaintiffs based their constitutional claim upon the state's conduct after

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3. Indeed, the *DeShaney* plaintiffs conceded that the State played no part in creating the danger that Joshua faced. *See id.* at 197. There is obviously no such concession in the present case. *See also DeShaney ex rel. First v. Winnebago County Dept. of Social Servs.*, 812 F.2d 298, 303 (7th Cir. 1987) ("There is no evidence that the Department was reckless in returning Joshua to the custody of his father back in January 1983.").

the state had relinquished custody of the child. *DeShaney* rejected this claim, for "while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all." *Id.* at 201. Because the above language may not describe *all* custody transfers, *DeShaney* did not categorically remove custody transfers from the set of cognizable due process claims. *See, e.g., Camp v. Gregory*, 67 F.3d 1286, 1294 (7th Cir. 1995) (child placed in guardianship of state has due process right not to be placed with custodian whom state knows will fail to supervise child adequately), *cert. denied*, 517 U.S. 1244 (1996); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (recognizing right of child in state custody not to be handed over to foster parent or other custodian whom state knows or suspects to be child abuser); *Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995) (state actors may be liable for transfer of custody back to child's parent if defendants were at least "deliberately indifferent" to danger of abuse by parent), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997). *DeShaney* does not foreclose the possibility that the present defendants — unlike those in *DeShaney* — did in fact create the danger that ultimately harmed S.S. or that they "render[ed] [her] more vulnerable to" that danger.

More generally, *DeShaney* limits the state's duty to protect its citizens from each other. It says little or nothing about the state's duty not to harm its citizens — the sort of

violation alleged by S.S. Joshua's complaint based a substantive due process claim upon the defendants' "*failing to intervene to protect him* against a risk of violence at his father's hand of which they knew or should have known." *Id.* at 193 (emphasis added). As such, his claim failed, for "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203. In stark contrast, S.S. does not merely allege that the state failed to protect her from Griffis; rather, the defendants affirmatively placed S.S. in Griffis's path despite their knowledge of the threat he posed.

B.

Notwithstanding the general rule that the government has no duty to protect its citizens, *DeShaney* and its progeny have set out two exceptions: the "special relationship" theory and the "state-created danger" theory. Under the former, the state has a duty to protect an individual under its care, custody, or control when the state has removed one's ability to care for oneself. *See DeShaney*, 489 U.S. at 199-201 (although state may bear affirmative duties when it "takes a person into its custody and holds him there against his will," Joshua's injury occurred while in his father's custody; state actors not liable for failing to protect Joshua, despite having earlier taken temporary custody of him); *Norfleet ex rel. Norfleet v. Arkansas Dept. of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (prison not sole setting in which state must safeguard an individual's civil rights); *Dorothy J. v. Little Rock School Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (restrictive custodial relationship may create state's duty to

protect individual from private harm, but state-mandated school attendance held insufficiently restrictive to do so). Under the "state-created danger" theory of liability, a duty to protect emerges after the state affirmatively places an individual in a position of danger that the individual would not otherwise have faced. *See, e.g., Greer v. Shoop*, 141 F.3d 824, 827-28 (8th Cir. 1998); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 913 (1993); *Wells v. Walker*, 852 F.2d 368, 369-70 (8th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989).

For the same reason that *DeShaney* does not control the present case, its two exceptions are also of limited relevance. Eighth Circuit precedent has consistently read the two *DeShaney* exceptions as just that, *i.e.*, as exceptions to the rule that the government has no duty *to protect* private individuals from other private individuals. In this circuit, the "special relationship" and "state-created danger" theories define the state's affirmative duty to protect people, not its more basic duty to refrain from endangering them. Significantly, in a number of decisions (one before and several after *DeShaney*) we have recognized the state's "duty to protect" when it affirmatively places an individual in a position of danger that he or she would not otherwise have been in, or when it assumes a custodial or other "special" relationship with an individual. *See Wells*, 852 F.2d at 370 ("Circuit court decisions examining whether a particular individual . . . *is entitled to protection by the state from third-party harm* generally recognize that the due process clause may be implicated in the following situations: First, when a 'special custodial or other relationship created or assumed by the state' exists . . . or second, when the state affirmatively

places a particular individual in a position of danger the individual would not otherwise have been in.") (emphasis added); *Gregory*, 974 F.2d at 1010 ("We have held that the Due Process Clause imposes a *duty on state actors to protect or care for citizens* in two situations: first, in custodial and other settings in which the state has limited the individuals' ability to care for themselves; and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced.") (emphasis added); *Carlton v. Cleburne County*, 93 F.3d 505, 508 (8th Cir. 1996) (same); *Davis v. Fulton County*, 90 F.3d 1346, 1350-51 (8th Cir. 1996) ("As a general rule, the Fourteenth Amendment does not impose any duty on states to *protect its (sic) citizens against violence inflicted by private actors* . . . . *DeShaney* recognizes an exception to this rule, however. A duty to protect an individual exists where she is in a special custodial or other setting in which the state has limited her ability to care for herself . . . . A *duty to protect* has also been recognized in the circuit courts when the state affirmatively places a particular individual in a position of danger that she would not otherwise have faced.") (emphasis added) (internal citations omitted).

1.

To the extent that S.S. predicates her lawsuit upon the defendants' "failure to protect" her from Griffis, her claims meet with only limited success. First, S.S.'s reliance upon the "special relationship" theory is unavailing. Although the state has a constitutional obligation to protect certain individuals under its care, that duty cannot extend beyond

the existence of the "special relationship" in question. Because the "special relationship" itself creates the state's duty to protect, the duty cannot outlive the relationship. Thus, custody is generally a prerequisite to any "special relationship"/duty to protect claim. *See, e.g., DeShaney*, 489 U.S. at 201 (no "special relationship" because child's injuries occurred while he was in father's custody rather than state's); *Norfleet*, 989 F.2d at 293 (state's obligation to provide medical care to asthmatic child arose because of "special custodial relationship" that state assumed when it placed child in state-run foster care setting). S.S.'s claim fails because Griffis sodomized her almost three months after the state relinquished custody of her. S.S. attempts to distinguish *DeShaney* by contrasting her two and one-half year period of state custody with the three-day temporary custody that the state had over Joshua DeShaney. *See DeShaney*, 489 U.S. at 201. This distinction is not relevant to the "special relationship" theory. The state's lengthy custodial relationship with S.S. may indeed bear upon whether the defendants acted recklessly or whether their actions "shock the judicial conscience" — *see* Part II B, *infra* — but it cannot extend the state's "duty to protect" beyond the relationship that created that duty.

2.

By contrast, S.S.'s complaint threads an elusive needle and states a viable claim under the "state-created danger" theory, which recognizes the obligation of state actors to subsequently *protect* an individual after they have created a danger to the individual's well-being. *See, e.g., Davis v. Fulton County*, 90 F.3d 1346, 1350-51 (8th Cir. 1996). Such

liability is entirely distinct from whatever liability may attach for the creation of the relevant danger in the first place. *See* Part II, *infra*. Thus, defendants may be liable both for creating the danger that Griffis would sexually abuse S.S. and for failing to protect S.S. once they created that danger. At this early stage, we cannot determine the extent of defendants' liability under a "state-created danger" theory. Further proceedings might establish, for example, the particular protective measures that defendants might have undertaken once S.S.'s father took custody of S.S. Thus, because it is far from "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), we conclude that S.S. has stated a viable claim under the "state-created danger" theory.[4]

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4. Appellees argue that the "state-created danger" theory does not apply because they neither created the danger faced by S.S. nor placed her in a worse position than if they had not assigned custody to her father. Specifically, they contend, S.S. was never sexually abused while in state custody even though she was on numerous occasions entrusted to her father's unsupervised care and subjected to Griffis's presence. Because Griffis had contact with S.S. both before and after the child's release from state custody, the change in custody "did not trigger any greater or new danger than existed prior to her release." Appellees' Br. at 15.

We are not persuaded. First, we conclude that the complaint did in fact allege that S.S. was abused by Griffis prior to the transfer of custody. The child abuse hotline call to McMullen, for instance, stated that "S. had a rash down there," and that "there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." McMullen acted upon the phone call

(Cont'd)

Appendix B

II.

A.

This case primarily concerns S.S.'s right not to be injured by the state — essentially a "negative liberty" — a right which both pre-dates *DeShaney* and is broader than S.S.'s right to be protected by the state, the "positive" liberty that *DeShaney* limited. *See K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 848-49 (7th Cir. 1990):

> This is not a "positive liberties" case, like *DeShaney*, where the question was whether the Constitution entitles a child to governmental protection against physical abuse by his parents or by other private persons not acting under the direction of the state. The Supreme Court agreed with this court that there is no such entitlement. Here, in contrast, the state removed a child from

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(Cont'd)
by visually examining S.S.'s genital area. These allegations suggest not only that McMullen suspected that Griffis was sexually abusing the child, but also that Griffis had in fact done so. Second, the complaint, liberally construed, suggests that S.S.'s release from state custody may have facilitated Griffis's sexual abuse of her. Indeed, the defendants documented their concerns about S.S. when they warned her father during the custody transfer that he would be "solely responsible" for any harm that Griffis might bring. Dismissal is appropriate only if it appears beyond a reasonable doubt that S.S. can prove no set of facts which would entitle her to relief. *See Whisman v. Rinehart*, 119 F.3d 1303, 1308 (8th Cir. 1997). We therefore must reject the appellees' argument that they did not create or enhance the danger that Griffis posed.

> the custody of her parents; and having done so, it could no more place her in a position of danger, deliberately and without justification, without thereby violating her rights under the due process clause of the Fourteenth Amendment than it could deliberately and without justification place a criminal defendant in a jail or prison in which his health or safety would be endangered, without violating his rights . . . under the cruel and unusual punishments clause . . . if he was a convicted prisoner, or the due process clause if he was awaiting trial.

(citations omitted). One may have a right not to be harmed by the state, a negative liberty, in circumstances that present no right to the state's protection from one's fellow citizens, a positive liberty. *See Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir.) (en banc) ("When the state itself creates the dangerous situation that resulted in a victim's injury, . . . [t]he state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party."), *cert. denied*, 516 U.S. 994 (1995); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("There is a constitutional right not to be murdered by a state officer, . . . [b]ut there is no constitutional right to be protected by the state against being murdered by criminals or madmen.").[5]

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5. If the Due Process Clause prohibits a state actor from "intentionally harming an individual physically without justification," then "[t]he extension [of this principle] to the case in which the plaintiff's mental health is seriously impaired by deliberate and unjustified action is . . . straight-forward." *See Camp v. Gregory*, 67 F.3d 1286, 1293 (7th Cir. 1995) (quoting *K.H.*, 914 F.2d at 848).

For example, although "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter," *DeShaney*, 489 U.S. at 201, state actors who rescue children then injure them may not defend on the ground that they had no duty to rescue the children in the first place. "The state, having saved a man from a lynch mob, cannot then lynch him, on the ground that he will be no worse off than if he had not been saved .... [T]he absence of a duty to rescue does not entitle a rescuer to harm the person whom he has rescued." *K.H.*, 914 F.2d at 849. *See also Pinder*, 54 F.3d at 1176 n.* ("creation" of danger implicates alternative section 1983 liability framework rather than either of *DeShaney*'s two exceptions, but courts should proceed with caution);[6] *Wood v. Ostrande*r, 879 F.2d 583, 591-95 (9th Cir. 1989) (denying qualified immunity defense to substantive due process claim, where woman was raped after officer impounded her car and left her alone in known high-crime area), *cert. denied*, 498 U.S. 938 (1990).

Therefore, even though children have no substantive due process right to be protected from abusive parents, the state may not itself subject children to abuse by knowingly

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6. *Pinder* would limit liability for the state's "affirmative acts" to cases in which the state actor directly injures the plaintiff, rather than cases in which the state's acts permit a third party to harm the plaintiff. *See* 54 F.3d at 1176 n.*. Rather than erecting a bright-line rule, we think the better approach to cases such as the one before us is to ask whether the state actor proximately caused the plaintiff's injury notwithstanding the third party's position in the causal chain. Indeed, both *Martinez v. California*, 444 U.S. 277, 285 (1980) and *Doe v. Wright*, 82 F.3d 265, 268 (8th Cir. 1996), suggest how courts might approach the question of proximate cause in such section 1983 cases.

delivering them into the hands of abusive caregivers. *See, e.g., Camp v. Gregory*, 67 F.3d 1286, 1294 (7th Cir. 1995) (child placed in guardianship of state has due process right not to be placed with custodian whom state knows will fail to supervise child adequately, where child was later killed after becoming involved in gang activity); *K.H.*, 914 F.2d at 852 (recognizing right of child in state custody not to be handed over to foster parent or other custodian whom state knows or suspects to be child abuser)[7]; *Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995) (state actors may be liable for transfer of custody back to child's parent if defendants were at least "deliberately indifferent" to danger of abuse by parent), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997).

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7. Although *K.H.* recognizes a right of children in state custody not to be handed over to abusive caregivers, Judge Posner's opinion exempts state actors from liability in cases where children are delivered back to their own parents. *See* 914 F.2d at 852-53. Like other courts that have considered *K.H.*'s distinction between placement with a parent and placement with someone else, we find the distinction unpersuasive. *See Ford v. Johnson*, 899 F. Supp. 227, 233 (W.D. Pa. 1995) ("The fact that the child is placed with a parent as opposed to a foster parent should not change the standards by which social agencies and their employees conduct their investigations. It is important to remember that in the case at bar, Shawntee had not been in the custody of her father, but, rather, had been in the custody of CYS and was placed with her father by the court after a CYS investigation and recommendation."), *aff'd without opinion*, 116 F.3d 467 (3d Cir. 1997); *Currier v. Doran*, 23 F. Supp.2d 1277, 1281 n.3 (D.N.M. 1998). For that matter, as *Currier* points out, Judge Posner himself appears to have since disavowed his position. In dictum, he stated that *DeShaney* would not bar liability if state actors were to place a child in a dangerous position by taking her to her father's house in violation of a court order. *See Bank of Illinois v. Over*, 65 F.3d 76, 78 (7th Cir. 1995).

Appendix B

The defendants in this case did not merely *fail to protect* S.S. from Griffis. Rather, they affirmatively placed S.S. into Griffis's path. McMullen, Jacoby and Barnett were fully aware of the risks to which they were subjecting S.S. but apparently decided that those risks were the sole responsibility of S.S.'s father. To be sure, it is not always easy to distinguish cases in which the state has merely failed to protect its citizens from those in which it has affirmatively injured them. We are mindful of "the tenuous metaphysical construct which differentiates sins of omission and commission," *see White v. Rochford*, 592 F.2d 381, 384 (7th Cir. 1979), but *DeShaney* itself compels us to distinguish the state's affirmative misdeeds from its unfortunate omissions, to differentiate misfeasance from nonfeasance: "The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195. The defendants in this case have transgressed the limitations — not the obligations — that the Due Process Clause imposes on state actors. They are a "doer of harm rather than merely an inept rescuer, just as the Roman state was a doer of harm when it threw Christians to the lions." *K.H.*, 914 F.2d at 849.

B.

Having concluded that *DeShaney* does not defeat S.S.'s claim, our analysis is not complete. Whether seeking to recover for the defendants' affirmative misdeeds (the transfer of custody to S.S.'s father) or for their failure to protect her after those misdeeds (the "state-created danger" theory), S.S. must still establish the elements that govern any substantive due process claim brought under section 1983. First, the

defendants must have acted with the requisite degree of culpability. *See Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (negligence insufficient, but leaving open recklessness or gross negligence); *County of Sacramento v. Lewis*, __ U.S. __, 118 S. Ct. 1708, 1718 (1998) (leaving open recklessness or gross negligence); *Sellers ex rel. Sellers v. Baer*, 28 F.3d 895, 902-03 (8th Cir. 1994) (gross negligence insufficient), *cert. denied*, 513 U.S. 1084 (1995); *Gregory v. City of Rogers*, 974 F.2d 1006, 1012 (8th Cir. 1992) (en banc) (reserving question of minimum level of culpability), *cert. denied*, 507 U.S. 913 (1993).[8] Second, because she challenges official actions rather than a legislative pronouncement, S.S. must establish that the defendants' conduct shocks the conscience. *See Lewis*, 118 S. Ct. at 1717 and n.8; *id.* at 1724 (Scalia, J., concurring). Third, she must prove that the defendants proximately caused her injuries. *See Brower v. County of Inyo*, 489 U.S. 593, 599 (1989); *see also Martinez v. California*, 444 U.S. 277, 285 (1980); *Doe v. Wright*, 82 F.3d 265, 268 (8th Cir. 1996).

Unlike negligence, "deliberate indifference" requires one's knowledge that a substantial risk of serious harm accompanies one's course of action. *See Farmer v. Brennan*,

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8. "Deliberate indifference" does not meaningfully differ from willful recklessness, *i.e.*, wherein the actor responds unreasonably to a substantial and known risk rather than to a risk of which the actor merely should have known. *See Farmer v. Brennan*, 511 U.S. 825, 836-39 (1994) (equating "deliberate indifference" with subjective or criminal recklessness). By contrast, so-called "civil recklessness" or "gross negligence" may exist when the risk of harm is so obvious that the actor should have known about it even if he or she did not actually know about it. *Id.* at 836 and n.4.

511 U.S. 825, 837 (1994) (prison official must know of and disregard excessive risk to inmate's health or safety); *Davis v. Monroe County Bd. of Educ.*, __ U.S. __, 119 S. Ct. 1661, 1674 (1999) (school officials are "deliberately indifferent" to student-on-student sexual harassment only when their response to it "is clearly unreasonable in light of the *known* circumstances") (emphasis added). S.S's complaint alleges that the defendants' actions evince a "deliberate and conscious indifference to the Plaintiff's safety and well-being and violate S.S.'s constitutional right to be reasonably safe from harm." J. App. 6, 8, 11. The alleged facts amply support this charge. McMullen knew that S.S.'s father had subjected his daughter to a known sex offender (evidenced by the anonymous telephone call she received, Dr. Sisk's psychiatric evaluation, the anonymous child abuse hotline call of July 1996, and Griffis's own complaints that his access to S.S. had been unfairly limited), while Jacoby documented her awareness of S.S.'s inappropriate sexual behaviors, S.S.'s complaints of pain in her genital area, various telephone calls to the Division that warned of Griffis's presence, and sexual abuse by S.S.'s father. Finally, McMullen herself wrote that she and her supervisor decided "that if something happens to S. because he [the father] knows what Joell [sic] has done in the past that he will be solely responsible."[9]

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9. The dissent argues that the defendants' actions amount to nothing more than gross negligence. To the contrary, the social workers knew the precise danger that faced S.S. if custody were returned to her father. Not only were they "aware of facts from which the inference could be drawn that a substantial risk of harm exists," but they also drew the inference itself. *See Farmer*, 511 U.S. at 837.

Appendix B

Whether the defendants' deliberate indifference shocks the conscience presents a separate but related question. *Lewis* explored the continuum of "deliberately indifferent" conduct and held that "deliberate indifference that shocks [the conscience] in one environment may not be so patently egregious in another." 118 S. Ct. at 1718.[10] Substantive due process therefore demands "an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." *Id.* at 1718-19. *Lewis* placed particular importance upon the state defendant's ability to actually deliberate upon his conduct before undertaking it. *Id.* at 1719. Therefore, the reckless police pursuit of a fleeing motorist in *Lewis* did not "shock the conscience" when injuries were caused thereby, *id.* at 1720, nor does a jailer's deliberately indifferent response to a prison riot establish an Eighth Amendment claim. *Id.* Prison officials' "deliberate indifference" toward a pretrial detainee's medical needs, on the other hand, can indeed implicate substantive due process. *Id.* at 1718-20. Such liability "rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Id.* at 1720.

We conclude that the defendants' conduct resembles the actionable deliberate indifference of prison officials more

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10. *Lewis* was decided two days before the defendants' brief was filed and seventeen days before the reply brief was filed. Although the case is not discussed in the parties' briefs and although no Fed. R. App. P. 28J letter has been filed with the court, *Lewis* points to the analysis that is required to assess S.S.'s substantive due process claim.

closely than the non-actionable recklessness of police officers who pursue fleeing suspects at high speeds through crowded cities. Unlike the police officers in *Lewis*, the defendants faced no split-second decision in determining S.S.'s custody. To the contrary, S.S.'s complaint recounts the defendants' reflections upon the risk to which they willfully subjected S.S. The allegations paint a picture that shocks the conscience of the court sufficiently to survive a motion to dismiss. First, Defendants caused injury to a well-recognized right of S.S.: her bodily integrity. *See Albright v. Oliver*, 510 U.S. 266, 272 (1994) (bodily integrity is among the fundamental rights implicated by substantive due process); *Lewis*, 118 S. Ct. at 1717 n.8 (whether conduct is conscience-shocking "may be informed by a history of liberty protection . . ."); *id.* at 1722 (Kennedy, J., concurring) ("History and tradition are the starting point . . . of the substantive due process inquiry."). Second, despite their obligations to safeguard S.S.'s best interests,[11] the defendants knowingly exposed her to a risk of sexual abuse and determined that S.S.'s father (not themselves) would be "solely responsible" if the child fell victim to Griffis's predations. Under these circumstances, we cannot conclude that "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), and we therefore reverse the dismissal of S.S.'s complaint.

Appellees have raised no issue of whether the defendants proximately caused S.S.'s injuries. Likewise, we need not

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11. *See* Mo. Rev. Stat. § 211.011 (1995) ("The child welfare policy of this state is what is in the best interest of the child.").

consider whether the appellees might be shielded from liability by absolute or qualified immunity — a question briefed by the parties below but left unresolved by the district court.

III.

For the foregoing reasons, the judgment of the district court is reversed, and the case is remanded for further proceedings consistent with this opinion.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

As the court notes, the decisions of the United States Supreme Court, and our own cases as well, erect numerous hurdles to a recovery by S.S. against these defendants. I pass over the difficulty of comprehending exactly what DeShaney requires when it speaks of distinguishing between acting and not acting, because I do not think that the complaint in this case lays out a case for anything more than gross negligence on the defendants' part. The court, moreover, does not explain why the defendants' deliberate indifference would render them liable, or, indeed, what the difference between gross negligence and deliberate indifference might be. Finally, although what the defendants are said to have done here may be grossly negligent, I cannot say that their acts shock the conscience in the constitutional sense. At most, the defendants exposed S.S. to a risk of personal and physical harm. If this is enough to make out a due process claim, then I cannot see how any complaint that alleges facts amounting to gross negligence or recklessness can ever fail to survive a motion to dismiss.

I therefore respectfully dissent from the court's holding in this case.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED FEBRUARY 4, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 97-0608-CV-W-SOW

S.S., by and through her Next Friend and guardian ad litem, Ellen D. Jervis,

Plaintiff,

v.

MICHELLE McMULLEN, et al.,

Defendants.

ORDER

Before this Court are defendants McMullen, Jacoby and Barnett's Motion to Dismiss, plaintiff's Opposition and defendants' Reply. For the reasons discussed below, defendants' Motion is granted and this case is dismissed.

I. *Standard*

When considering a motion to dismiss, an assumption must be made that all the facts alleged in the complaint are true and a dismissal may be granted "only if it is clear that no relief can be granted under any set of facts that could be

proved consistent with the allegations." *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir. 1993) (citation omitted). A motion to dismiss should not be granted "unless it appears beyond a doubt that the plaintiff can prove no set of facts . . . which would entitle plaintiff to relief." *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982) (citation omitted).

II. *Background*

Plaintiff S.S., born February 21, 1991, was taken into protective custody by the Cass County office of the Missouri Division of Family Services ("DFS") in January 1994. The allegations were that plaintiff had human feces smeared on her face by her father; she was locked in her bedroom for periods of time by her parents; and she had been sexually abused by an unknown perpetrator. The family previously had several substantiated child abuse hotlines for neglect.

On April 5, 1994, the Circuit Court of Cass County, Missouri, placed S.S. in the custody of the DFS for placement in foster care. Defendant McMullen, a DFS social worker, was assigned to plaintiff's case in February 1994. In May 1994, defendant Jacoby, a DFS social worker, was also assigned to plaintiff's case. Defendant Barnett was McMullen and Jacoby's supervisor. Defendant Cynthia Montgomery, who has not joined in this motion, was employed by DFS as a contract therapist.

Plaintiff's father, Jon Spindle, was allowed supervised visits with plaintiff. Joel Griffis, a friend of Jon Spindle, was present during some of those visits. Both defendants McMullen and Jacoby were aware of Joel Griffis' contact with S.S. during those supervised visits.

Appendix C

Defendant Jacoby knew of the foster mother's telephone call on June 20, 1995, in which she stated that ". . . S. told her over and over that she humps with her Daddy, Jon." Defendant Jacoby was also aware of S.S.'s inappropriate sexual acting out behavior.

On September 20, 1995, defendant McMullen received an anonymous telephone call informing her "that a man named Joel who has been convicted of numerous sex charges has been around [S.S.] and her father Jon Spindle." Defendant Jacoby documented knowledge of the anonymous telephone call received by her office regarding Griffis' history as a pedophile on September 21, 1995.

Plaintiff's father was allowed unsupervised visits with plaintiff from October 6, 1995, until March 1996. In March of 1996, DFS sent S.S. to live full-time with her father on an "extended visit," although she was still legally in the DFS custody. Defendant McMullen was informed by various sources that the father had allowed contact between Griffis and S.S. Defendant Jacoby received a telephone call from S.S.'s foster parent on October 6, 1995, telling her that Joel Griffis was with Spindle when he picked up S.S. for her unsupervised visit. Defendant Jacoby also knew that S.S. had contact with Griffis during Thanksgiving weekend in November 1995 and on January 10, 1996.

On May 7, 1996, defendant McMullen received a copy of a Dr. Gregory Sisk's psychological evaluation of Spindle, conducted at the request of DFS. Dr. Sisk's report states that "[h]e seems dangerously sympathetic with a known child sexual offender, which would appear to be very risky

behavior." Dr. Sisk's report further states that ". . . plans toward reunification should proceed cautiously." Spindle had, on February 27, 1996, told defendant McMullen that he did not think Griffis' contact with his daughter was a problem.

On December 19, 1995, defendant Jacoby knew that S.S. had a yeast infection and was complaining of ". . . hurting in her vagina area." On July 1, 1996, defendant McMullen was aware of an anonymous child abuse hotline alleging that ". . . S. had a rash 'down there' that there is also a man who hangs around the household that S.S. calls grandpa and that he used to be a child molester." Defendant McMullen questioned S.S. at her day care and visually examined her "vagina area," stating that ". . . I saw nothing."

On August 13, 1996, Joel Griffis called defendant McMullen. Griffis told McMullen that it was unfair to limit his contact with S.S.

On August 21, 1996, defendant McMullen and her supervisor, defendant Barnett, decided ". . . that if something happens to S. because he [her father] knows what Joell has done in the past that he will be solely responsible." On that same day, defendant McMullen requested that the Court release S.S. from the custody of the State and return her to the legal custody of her father. The Circuit Court of Cass County followed the recommendation of defendant McMullen and DFS. S.S. was returned to the legal custody of her father and released from the Court's jurisdiction on August 22, 1996.

On February 5, 1997, a child abuse hotline was received in Jackson County, Missouri, alleging that on at least two

occasions Griffis had sexually molested S.S. The alleged dates were November 15, 1996 and January 15, 1997. Plaintiff S.S. was placed in protective custody of the Missouri Division of Family Service by the Jackson County office on February 11, 1997.

After an investigation, Joel Griffis was charged with two counts of 1st degree statutory sodomy in Jackson County and with two counts of statutory sodomy in Cass County. Plaintiff's father, Jon Spindle, was charged with four counts of felony endangerment of a child in Jackson County. As a result of the abuse, S.S. was hospitalized at Charter Hospital for approximately one week, and at the time the Complaint was filed, was institutionalized at a psychiatric treatment facility in Kansas City, Missouri.

III. *Discussion*

Plaintiff S.S. alleges that defendants McMullen, Jacoby and Barnett deprived her of her constitutional right to be reasonably safe from harm in violation of the due process clause of the Fourteenth Amendment. Defendants McMullen, Jacoby and Barnett argue that plaintiff's allegations do not give rise to a due process claim and they are protected from liability by absolute and qualified immunity.[1]

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1. Because this Court finds that plaintiff's allegations do not give rise to a due process claim, it is unnecessary to discuss whether defendants would be protected from liability by absolute or qualified immunity.

Appendix C

A. *Substantive Due Process*

Relying on *DeShaney v. Winnebago County, Dept. of Social Services*, 489 U.S. 189 (1989), defendants assert that they "had no substantive due process duty to protect plaintiff from harm through her father's neglect or abuse." Def. Reply 1. Plaintiff argues that "[p]laintiff's substantive due process right to personal safety was created when the state affirmatively exercised its power and removed the child from the custody of her parents." Pl. Opp. 2. Relying on *Norfleet v. Arkansas Dept. of Human Services*, 989 F.2d 289 (8th Cir. 1993), plaintiff asserts that this case is not controlled by *DeShaney* because the state actually took custody of plaintiff and then placed plaintiff in a position of danger.

The United States Supreme Court held in *DeShaney* that:

> [w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

DeShaney, 489 U.S. at 201. The Court explained that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. *Id.* at 200.

Plaintiff attempts to distinguish *DeShaney* from the present case, because DFS only took temporary custody of Joshua DeShaney before returning him to the custody of his father, while S.S. was placed in permanent custody of DFS for over two and a half years before she was returned to the legal custody of her father. Another distinction between this case and *DeShaney* is that in *DeShaney* petitioners conceded the state did not play a role in creating the danger. *Id.* at 197.

The cases plaintiff cites in support of her claim involve abuse that occurred while the children were in the custody of DFS and placed in foster care. The Supreme Court left this issue open in *DeShaney*. *DeShaney*, 489 U.S. at 201, n. 9 ("Indeed, several Courts of Appeals have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. . . . We express no view on the validity of this analogy, however, as it is not before us in the present case.")

In *Norfleet*, the Eighth Circuit Court of Appeals held that ". . . a special custodial relationship . . . was created by the state when it took Taureen from his caregiver and placed

him in foster care." *Norfleet*, 989 F.2d at 293. The Court further stated that "the Due Process Clause imposes a duty on state actors to protect or care for its citizens in two situations: first, in custodial and other settings in which the state has limited the individual's ability to care for themselves (custodial cases); and second, when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced (state-created danger cases)." *Id.* at 293 (quoting *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992)).

Plaintiff does not allege that she was abused while she was visiting her father and still in state custody. This would be a very different case if she had. The alleged abuse occurred after she was returned to her father's custody and she no longer had a custodial relationship with the state. Based on the reasoning in *DeShaney*, there was not, therefore, a special relationship between S.S. and the state. This Court fails to see how the distinction between the state taking permanent custody versus temporary custody prior to returning the child to the custody of her father changes the *DeShaney* analysis. The foster care cases cited by plaintiff also fail overcome the holding in *DeShaney* and support that a special relationship existed between S.S. and the state.

Plaintiff also asserts that the state placed plaintiff in a position of danger. In *DeShaney*, petitioners conceded the state did not play a role in creating the danger. *DeShaney*, 489 U.S. at 197. In state-created danger case, the issue is whether the state affirmatively placed plaintiff in a position of danger she would not otherwise have faced. *Norfleet*, 989 F.2d at 293.

Appendix C

DFS received several hotline calls regarding plaintiff. An argument can be made that the state's actions placed plaintiff in a greater position of danger or vulnerability because the state interfered with any potential rescue by private persons. Those individuals who would have come to plaintiff's aid were deterred from taking action. They were under the belief that once they reported their concerns to the state, the state would protect plaintiff from harm. Under this reasoning, plaintiff was in greater danger than the general public because the state's perceived action prevented her from receiving help she would have otherwise received.

The flaw with this reasoning is that private persons concerned with the welfare of plaintiff do not have the power to protect her from her father. The private individuals who made hotline calls took the only action they had to protect plaintiff. Also, under this reasoning, every case in which the state took custody and then returned the child to the custody of the parents who then abused the child would result in a due process claim. The Supreme Court held in *DeShaney* that ". . . the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *DeShaney*, 489 U.S. at 201. Because this Court finds that the state did not place S.S. in a position of danger she would not otherwise have faced, it is unnecessary to discuss whether defendants' conduct met the required showing of culpability.

B. *Procedural Due Process*

Defendants argue that the state statutes do not provide plaintiff with a substantive right to remain free from abuse, or a clearly definable benefit, but merely provide the

procedure to followed when an allegation of abuse occurs. Plaintiff asserts that because Missouri Revised Statutes §§ 210.115[2] and 210.145.5[3] set out mandatory procedures to be followed by social workers and the Division of Family Services, S.S. has a protected liberty interest in personal safety.

The United States Supreme Court has held that:

> [w]e examine procedural due process questions in two steps: the first asks whether there exists a liberty or property interest which has been

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2. Section 210.115 provides in part:

> When . . . [a] social worker . . . has reasonable cause to suspect that a child has been or may be subjected to abuse or neglect or observes a child being subjected to conditions or circumstances which would reasonably result in abuse or neglect, that person shall immediately report or cause a report to be made to the division in accordance with the provisions of sections 210.109 to 210.183.

3. Section 210.145.5 provides in part:

> Upon receipt of a report, which, if true, would constitute a violation of . . . or an attempt to commit such crime, the local office shall contact the appropriate law enforcement agency and provide such agency with a detailed description of the report received. In such cases the local division office shall request the assistance of the local law enforcement agency in all aspects of the investigation of the complaint. . . .

> interfered with by the State; [and] the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient. . . . [A]n individual claiming a protected interest must have a legitimate claim of entitlement to it. Protected liberty interest may arise from two sources — the Due Process Clause itself and the laws of the State.

Kentucky Dept. of Corrections v. Thompson, 109 S.Ct. 1904, 1908 (1989) (citations omitted). The Supreme Court has further stated that:

> [p]rocess in not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a claim of entitlement . . . State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

Olim v. Wakinekona, 103 S.Ct. 1741, 1748-49 (1983).

Does state law give plaintiff a legitimate claim of entitlement in a benefit that the state cannot deprive plaintiff of without due process of law? Missouri's child abuse statutes seek to promote and balance competing interests. "The child protection system shall seek to promote the safety of children and the integrity and preservation of their families . . ." Mo. Rev. Stat. § 210.109.2. The statute sections cited by plaintiff, §§ 210.115 and 210.145.5, address reporting and investigative procedures. These statutes are not sufficient to

create a liberty or property interest, because they only give plaintiff an expectation that certain procedures will be followed. The statutes do not require a particular substantive result or give plaintiff a legitimate claim of entitlement in a benefit. *See Myers v. Morris*, 810 F.2d 1437, 1469 (8th Cir. 1987) (Minnesota statute does not create a liberty interest in the family unit.); *Doe v. Hennepin County*, 858 F.2d 1325, 1329 (8th Cir. 1988) (Minnesota statute does not create a liberty interest in the family unit or a property interest in social services.); *Tony v. Childers*, 71 F.3d 1182, 1186 (6th Cir. 1995) (Kentucky child protection statutes do not create a due process liberty interest.); and *Doe v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990) (Wisconsin child abuse reporting statute does not create a property interest).

Plaintiff cites *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) in support of her argument that plaintiff has a protected liberty interest in personal safety. In *Taylor*, the Eleventh Circuit Court of Appeals held that:

> the Georgia scheme mandates that officials follow guidelines and take affirmative actions to ensure the well being and promote the welfare of children in foster care. These children can state a claim based upon deprivation of a liberty interest in personal safety when the officials fail to follow this mandate.

Id. at 799. In *Taylor*, the mandatory procedures in the foster care statutes sought to promote one substantive result or benefit, safety of children in foster homes. Missouri's child abuse statutes establish reporting and investigative

procedures to be followed but do not seek to promote only one result or benefit. The child abuse statutes ". . . seek to promote the safety of children and the integrity and preservation of their families . . ." Mo. Rev. Stat. § 210.109.2. Because the statutes do not require a particular substantive result and only give plaintiff an expectation that certain procedures will be followed, plaintiff cannot have a legitimate claim of entitlement in a benefit.

IV. *Conclusion*

This case is unsettling. Beyond the discussion of legal claims is a sadness, a sadness for the suffering of a little girl and a sadness for the system that could not protect her. We as a society should be upset by her story, but our desire to hold someone responsible does not create a due process claim.

It is hereby

ORDERED that defendants McMullen, Jacoby and Barnett's Motion to Dismiss (doc. # 11) is granted. It is further

ORDERED that, based on the same reasoning, the claim against defendant Montgomery is also dismissed.

s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

February 4th, 1998.